

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1140

To be argued by

DOUGLAS F. EATON

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1140

B p/s

UNITED STATES OF AMERICA,

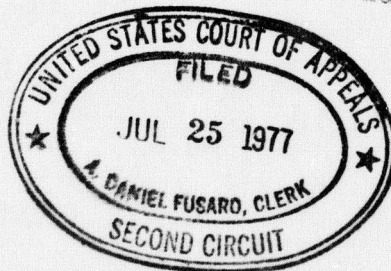
Appellee,

v.

EDWIN J. SCHULZ,

Appellant.

REPLY BRIEF FOR APPELLANT EDWIN J. SCHULZ



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Dated: July 7, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-1140

UNITED STATES OF AMERICA,

Appellee,

v.

EDWIN J. SCHULZ,

Appellant.

REPLY BRIEF FOR APPELLANT EDWIN J. SCHULZ

I. SCHULZ' REPLY TO THE GOVERNMENT'S STATEMENT OF FACTS

On appeal, we must, of course, view the facts in the light most favorable to the Government. But this does not mean that the Government can state the facts unfairly. The statement of facts in the Government's brief was unfair to Schulz. The following reply is arranged in the order of the pertinent paragraphs of the indictment.

A. ¶¶ 10-11 (The First Two Land Sales)

The Government's brief (see p. 74) tacitly concedes that there was no evidence to justify the charges made against Schulz concerning the first two land sales.

B. ¶12 (The Third Land Sale)

As to the third land sale, the Government's brief, at p. 75, states that "an examination of Schulz' accounting department records would have shown" the backdoor financing. The Government then cites GX 65, 66 and 69. None of those exhibits were Accounting Department records. They are simply three checks paid to Homex on that land sale. Schulz' department did not keep track of Homex's bank balances, obtain loans, deposit money, or sign any Homex checks. All of those functions were handled by the Department of the Treasurer Paul Kuveke. (Tr. 1765-66) For the reasons stated in Schulz' initial brief at p. 7, the prosecutor's rebuttal summation was improper when it urged the jury to infer that Schulz knew, or should have known, about the backdoor financing.

The Government's brief, in a footnote running from pp. 75-76, attempts to justify the portion of Judge Frankel's charge which misstated Schulz' contentions about ¶¶ 10-12. See Schulz' initial brief, pp. 61-62. The Government makes an elaborate syntactical argument about "the antecedent" and "the referant" in an attempt to show that Judge Frankel was not really focusing on ¶¶ 10-12. This attempt is silly. At that point, Judge Frankel was taking the jury through the seven key paragraphs (¶¶ 10-16) one at a time. When Schulz

objected, Judge Frankel understood his point immediately, but apparently felt it was too time-consuming to go back and separate Schulz' land-sales contentions from those of the Stirlings and Yanowitch:

"If you didn't make that position clear, I am sorry. I can't take each defendant and point him to the issue and say he argues this and he argues that. I understand your exception and I deny it." (Tr. 6027, Schulz App. 170.)

As a fall-back argument at the end of the same footnote, the Government suggests that Schulz deserved to be saddled with his co-defendants' land-sales defense because, it is said, Schulz' summation had argued that two witnesses had lied in some way that was "related to at least one of the three land sales." Schulz' summation made no such argument. It simply pointed out the following: ¶¶ 10-12 accused Schulz of participating in arranging the land sales; there was no evidence of that; two CPA's (Mauriello and Murray) participated in arranging the third sale; they did not get suspicious; they approved the inclusion of that sale in Homex's income. (Tr. 5779-80)

C. ¶ 13 (Reassignments)

We have conceded that there was sufficient evidence against Schulz on ¶ 13, but we have also stated that it was highly likely that the jury accepted his defense to ¶ 13:

disclosure to Peat Marwick and reliance on their approval.

(Schulz was not a CPA.)

The Government's brief now concedes that Peat Marwick knew about the "reassignments." At p. 50 it claims that Peat Marwick knew about "less than 10%" of the reassignments. That percentage is simply the number of reassignments which were specifically noted in Peat Marwick's work papers. * It is true that many of those particular reassignments involved a single customer's changing from one model to another. However, Peat Marwick also knew about the other common type of reassignment, the switching of a module from one customer to another. ** At p. 37, the Government asserts that some of the reversals were "effectively hidden from any prying auditors' eyes." The Government fails to mention two uncontradicted facts: (1) each journal entry had an explanatory footnote which clearly stated that it was a reversal, and (2)

* It is highly possible that the jury doubted the completeness of Peat Marwick's work papers. Michael Horn, who was and is a partner in Peat Marwick, destroyed at least two of Peat Marwick's documents after a Rule 34 request for documents was served on Peat Marwick in the civil litigation. (Tr. 4823-26)

** Schulz wrote to Murray: "The company manufactures modules against specific backlog orders but reserves the right to substitute other orders as conditions require." (GX 809, emphasis supplied; see Tr. 3449) Woods, the supervisor of Peat Marwick's audit team, wrote that "once in a while modules may later be switched to a different project." (Schulz Exh. B-17, emphasis supplied)

the Peat Marwick auditors saw these entries. (Tr. 2472-74) Despite all this, the Government claims, at p. 22, that Peat Marwick was deceived by the computer printout known as "File 2," which was ordered and created by Howard Byron, an executive who was not in Schulz' department. Schulz' initial brief, at pp. 13-14, explained in detail why "File 2" was not deceptive and was not a "double set of books." The Government's brief does not attempt to refute that explanation.

At pp. 65 and 77, the Government's brief talks at length about the sales for the first quarter ended October 31, 1970. The Government fails to mention that the sales for that quarter were not audited and were not filed with the SEC (and did not have to be). It was perfectly proper for Schulz to book the Southbridge and Clay contracts on the assurance of Homex's Legal Department that those contracts had been entered into. The only time that it was necessary for Schulz to obtain copies of any contracts was months later, when the auditors came to audit the first six months.

The Virgin Islands reassignment is described misleadingly by the Government at pp. 39-41 and 72-73. Homex had valid contracts for two housing projects with a Virgin Islands developer. Homex built all 200 dwelling units for the first of these contracts, and booked the sales price during

the fiscal year ending July 31, 1971. On August 26, 1971 the developer did send Homex a telegram which blusteringly "cancelled" the contract and asked Homex to contact him and listen to his request for a reduction in the contract price. (GX 573). However, the very next day, the bluster ended; the developer signed and sent to Peat Marwick a confirmation acknowledging that he owed the full contract price. (GX 252A at 21,840-41) Peat Marwick quite properly certified the inclusion of this sale in the year's income. Subsequently, in the fall of 1971, Schulz travelled to the Virgin Islands on his first "field trip", after he had been replaced as Comptroller and had been given the title of Vice-President of Operations. (Tr. 3312) Schulz concluded that, even though Homex had a valid contract, there would be a substantial delay and perhaps a default, in view of the developer's economic situation at that time. (Tr. 3382-86) (This contract was atypical for Homex in that the site work prior to installation was the responsibility of the developer; Tr. 4828.) On or about October 31, 1971 when Homex was writing up its sales for the first quarter ending on that date, Schulz advised the new Comptroller to reassign the 200 dwelling units from the Virgin Islands project to other projects, which he correctly anticipated would be completed sooner. It is undisputed

that Schulz promptly advised Peat Marwick about this re-assignment, and that three Peat Marwick partners concluded that there was no need for a prior-period adjustment. The Government has not shown why there should have been such an adjustment. In any event, it is totally in error at p. 73, where it asserts that Schulz and David Stirling "explicitly analyzed in writing the method of avoiding the APB's disclosure requirements for prior-period adjustments." The citation for this assertion is GX 923, which was a memo written to David Stirling and Schulz by Treasurer Kuveke who, unlike Schulz, was a CPA. Kuveke discussed the requirements for prior-period adjustments in a neutral, straightforward way, without a hint of any "method of avoiding the APB's disclosure requirements."

D. ¶ 14 (The Mississippi Sale Based on the Forged Letter)

With respect to the forged Farmers Home letter, the Government argues, at p. 77, that the jury could properly impute guilty knowledge to Schulz on the basis of his memorandum to Yanowitch. Two copies of that memorandum were in evidence, GX 630 and GX 815. The part the Government relies on reads as follows:

"6. I also informed Jerry [Jerome Dienstag] of the Greater Gulf Coast contract for 800 dwelling units and discussed with him the financing techniques to be employed. I mentioned the Farmers Home Administration as being the ultimate source of funds, but suggested that he discuss this with you before disc-
closing it to any outside parties."
(Emphasis supplied)

The Government characterizes this as "Schulz' own memorandum of his having instructed Dienstag to withhold" the existence of the Farmers Home letter. (Govt. brief p. 77, emphasis supplied) This characterization is absurd on its face.

Moreover, Dienstag testified as a witness for the Government. A man of scrupulous probity, he was the Homex attorney who drafted the prospectus. He later wrote a memo which scathingly criticized the Stirlings and Yanowitch, and he left the company shortly after Schulz did. Dienstag testified about his discussions with Schulz. He never stated that Schulz gave him any secrecy "instruction," or that Schulz ever did anything suspicious or improper. (See Tr. 2838-39, 3019-20)

At p. 80, the Government claims that the jury was entitled to find that Schulz was the "instigator" of the \$15 million forgery, because of the prior forgery of some irrelevant shipping receipts. The attempt to blame Schulz

for the prior forgery was pathetic.* The attempt to blame him for the Farmers Home forgery is shocking. The jury heard the testimony of virtually every person who was involved in the Mississippi sale. The jury was presented with only two possibilities as to who signed W.T. Richardson's name to the Farmers Home letter: Rubel Phillips' secretary, or Richardson himself. The Government urged the jury to accept the first possibility and they clearly did, since they convicted Phillips.

E. ¶ 15(a) (The 1970 Estimated Cost Overruns)

As with ¶ 13, we have conceded that there was sufficient evidence against Schulz on ¶ 15(a), but we have also stated that it was highly likely that the jury accepted his defense to ¶ 15(a). Although Schulz' initial delay in recording the 1970 overruns was admittedly improper, it occurred after the first stock offering; before the second

* The attempt was based solely on the testimony of one Richard McKeown. (Tr. 3031-35) However, the evidence as a whole clearly showed that the shipping receipts were forged by McKeown. Drafts of these forgeries were found after the bankruptcy in McKeown's office, with McKeown's handwriting on them. (Tr. 3040-46) Another Government witness, Richard Hurtt, testified that back in 1969 McKeown had begun to forge some other shipping receipts, again to cover up for his own negligence, and had been stopped by Hurtt and Schulz. (Tr. 2495-98) The evidence against McKeown was analyzed in Schulz' summation. (Tr. 5800-15) The Government's lengthy rebuttal summation made no attempt to rehabilitate McKeown's testimony.

offering (and before the statute of limitations in this case) Peat Marwick had all the facts about the overruns, and concluded that it was proper to record them as accounts receivable. In reaching this conclusion, Peat Marwick and Schulz relied on (1) a good history of collection of past overruns, * (2) a thorough review of the facts on each project, ** and (3) five HUD letters *** responding to Schulz' claims for additional costs. The Government's brief, at p. 67, inexplicably refers to these as "phony HUD letters." Their authenticity has never been disputed. Peat Marwick and Schulz found them very reassuring, and understood that actual collection would not occur for several months. (See Schulz Exh. B-7) The Government, at p. 66, notes Schulz' February 8, 1971 memo, which was in evidence as both GX 598 and GX 817. This memo did indicate uncertainty about the collectability of the overruns. However, the Government fails to mention two key facts: (1) Schulz had not yet received the

* Schulz Exh. B-7.

** Schulz Exhs. B-13, B-14, B-21, B-24, B-26, B-27; Tr. 4760.

*** Schulz Exhs. E-7 through E-11.

HUD letters, and (2) Homex had not yet engaged Peat Marwick, and had only recently begun exploratory discussions with them. Schulz, with complete justification, only discussed the overruns with Peat Marwick after they were engaged.

F. ¶ 15(b) (U.S. Shelter Revenue)

The issue here was whether Schulz knew that the U.S. Shelter letter contract, dated February 15, 1971, was not executed until March 18, 1971. In an effort to show such knowledge, the Government's brief, at p. 78, mischaracterizes GX 815 at 95,300. This memo, written by Schulz on March 17, 1971, merely shows him acting as a messenger from Peat Marwick to Yanowitch (with copies to the Stirlings).

The pertinent portion reads:

"Please use this memo as a checklist reminder of those items requested by the auditor, which they have indicated that they want as soon as possible:

* * *

"4. The signed U.S. Shelter financing fee letter from the Greater Gulf Coast contract."

The Government's brief says that Schulz wrote this "in order to prod them to have Phillips obtain" the letter. The memo does not use the word "obtain," and it does not indicate any doubt that the letter had already been signed. Such contracts were never kept in Schulz' office, and it was routine for him to pass on requests for them at audit time.

G. ¶ 15(c) (Capitalization of General and Administrative Expenses)

It is undisputed that it was Murray's idea to capitalize the \$832,000 spent by Homex in connection with the Mississippi plant. At the trial, Murray continued to maintain that this capitalization was entirely proper. (Tr. 3293-94, 3532) The Government, at p. 79, says that Schulz must have known that something was wrong because, it asserts, he "apprehended" it "as possibly presenting problems if discovered by the underwriters' attorneys." The Government cites GX 815 at 95,098 ¶7. In that memo, Schulz merely passes on to Yanowitch the detached opinion of Jerome Dienstag, whose probity the Government has never questioned, and whose job it was to deal with the underwriters' attorneys:

"7. I also indicated to Jerry that the Company had recorded \$832,000....The underwriters attorneys should not be interested in the \$832,000 invoice unless Peat, Marwick & Mitchell finds it necessary to footnote this item...."

II. SCHULZ' REPLY TO THE GOVERNMENT BRIEF's POINT I (THE "NATELLI" ISSUE)

On the factual aspect of the "Natelli" issue, the Government continues to assert that it proved each of the specifications charged against Schulz (with the exception

of ¶¶ 10-11, as to which it tacitly concedes that was no evidence against Schulz). Unfortunately, Judge Frankel never analyzed the facts against Schulz, although he did remark, outside the jury's presence, that "Mr. Schulz is not involved, by and large, with the Greater Gulf Coast business [¶14]." (Tr. 5521, Schulz App. 155) On the legal aspect of the "Natelli" issue, the Government has belatedly made important concessions to Schulz.

First, it implicitly concedes that Schulz presented the "Natelli" issue to the trial judge more clearly than the other defendants,* and more clearly than Scansaroli did in the Natelli case. Second, it concedes that, if there was insufficient evidence on any of the specifications against Schulz, then Schulz' request to charge was properly worded as to eight of the nine counts. At pp. 54-55, the Government states:

"...The defendants were at most entitled to a charge that the jury was not to consider the evidence against the defendant set out in the challenged paragraph as a basis for conviction on a substantive count...."

* Schulz had more need for a "Natelli" instruction than David Stirling or Yanowitch had. As shown, in Schulz' initial brief, at pp. 53-54, 60-62, there was a very real possibility that the jury accepted Schulz' defenses to ¶ 13 and ¶15(a), and yet convicted him, at the Government's urging, on ¶¶10-12, or ¶ 14. It is far less likely that the jury accepted Stirling's testimony about the land sales and the union stock, or Yanowitch's testimony about the land sales and the Mississippi deal, and yet convicted either of them on the technical accounting specifications.

This is what Schulz requested. He did not ask the jury to ignore any of the evidence. Tracking the language in the Natelli case, he requested a withdrawal of certain specifications, and requested the Court to charge, "You may not convict Mr. Schulz on the basis of any of the specifications which I have withdrawn." (Schulz App. 140)

At trial, the Government responded to Schulz' request by submitting an 8-page memorandum, which appears at Schulz App. 142-49. Before Judge Frankel, the Government did not make the concession which it has made to this Court. Instead, it asserted that, even if certain specifications were unproven, the Natelli case did not entitle the defendants to any withdrawal instruction. Judge Frankel explicitly relied on that memorandum in making his ruling. (Tr. 5521, Schulz App. 155)

On appeal, the Government has changed its mind. Now it says that, if certain specifications were unproven, the appropriate defendant was "at most" entitled to a withdrawal instruction on the eight substantive counts. The Government pins its hopes on the conspiracy count. It then asks that the substantive counts be sustained under the "Pinkerton" case.

However, in the case at bar, there were no grounds for drawing any distinction between the conspiracy count and

the substantive counts, and it is doubtful that Judge Frankel would have done so if the Government had made this argument to him. All nine counts were as similar as nine peas in a pod. The only disputed allegations were the same in each count, namely ¶¶ 10-16, which were incorporated by reference in each count.

As to the "Pinkerton" case, Judge Frankel correctly stated that it was inappropriate* to the case at bar, and that he would not give any "Pinkerton" charge except to address the statute of limitations issue.** (Tr. 5513, 5515; Stirlings Joint App. A 525, A 527. See generally Tr. 5511-16, 5537-38, 5546-47.) In any event, the "Pinkerton" theory is optional to the jury; it cannot "cure" the substantive counts if the jury should have been given a "Natelli" instruction.

* Unlike the case at bar, the "Pinkerton" case involved such a simple conspiracy that the substantive crimes were necessary consequences, so the Court could state: "The unlawful agreement contemplated precisely what was done." (328 U.S. at 647, emphasis supplied)

** Almost all of the evidence against Schulz antedated the statute of limitations. In the context of that issue, Judge Frankel gave the jury a version of the "Pinkerton" charge. (Tr. 6063-67; Stirlings Joint App. A 652-A 656) Therefore, the Government can fairly say that the jury found that Schulz knowingly participated in at least one specification of misrepresentation, and that he "foresaw" that another defendant would continue to perform acts in furtherance of that part of the fraud scheme after the statute of limitations. However, the Government can not fairly say that the jury found that Schulz "foresaw" that another defendant would make a specified misrepresentation even though there was no evidence that Schulz knew about it. Judge Frankel's "Pinkerton" charge cannot be read to go beyond its stated intent, and to render nugatory his repeated instructions, on each of the substantive counts, that no defendant could be convicted on the basis of misrepresentations in which he was not charged to have participated personally. (Tr. 5978, 5989, 6032-36, 6039; Stirlings Joint App. A 566, A 577, A 621-625, A 628)

At page 100, the Government's brief acknowledges the need for a "focused individualized instruction." It states:

"...The charge as given was eminently fair to Phillips, carefully instructing the jury that guilt is individual; indeed this was done not only in a general instruction, but also the jury's attention was repeatedly focused on the fact that Phillips was not named in various counts* of the indictment.... In relation to Count Two this admonition was repeated to prevent any conviction not founded on those omissions and false statements with which Phillips was charged."
(Emphasis supplied)

But Schulz was hurt by these same instructions, because they emphasized, without any individualized comment, that Schulz was charged in every specification but one. The issue should have been not merely which defendants had been charged in a given specification, but which specifications had been supported by enough evidence to base a conviction against a given defendant. Judge Frankel declined to rule on the latter question, and accordingly the jury was never told about it.

* The word "counts" is an understandable misstatement for "specifications"; in the case at bar, the specifications [¶¶ 10-16] were indeed as distinct and separable as counts.

III. SCHULZ' REPLY TO THE GOVERNMENT BRIEF's POINT V
(THE RULE 11(e)(6) ISSUE)

There is no dispute that Schulz engaged in plea bargaining commencing in April 1976, after the prosecutor telephoned Schulz and informed him that he was going to recommend his indictment. * (Tr. 2009-10, Schulz App. 99-100) Schulz' motion made it clear that he had no objection to the use of any evidence of the statements he made prior to April.

In a footnote at p. 104, the Government claims, for the first time, that even if Schulz' motion had been granted, it could have proven the same facts "by different untainted means." First of all, the Government incorrectly states that the jury heard only two admissions that were the subject of Schulz' motion. As stated in Schulz' initial brief at p. 4, the jury heard three such admissions. (Tr. 2496-98, 2606-10, 3382-86) Furthermore, one of these admissions, as the Government concedes, was brought by Schulz

* The prosecutor gave him this information in fulfillment of a gentleman's agreement memorialized in an exchange of letters with Schulz' counsel. (Schulz App. 23-24, annexed to Schulz' motion papers; the same letters appear again at Schulz App. 40-41.)

to the grand jury in writing, and was prepared by him a couple of days earlier "without the slightest governmental knowledge." Of the remaining two admissions, the Government asserts, for the first time, that one was made during one of the five interviews in January and February 1976. There is nothing in the record that remotely supports that assertion, and it is contrary to the prosecutor's affidavit to Judge Frankel, which characterized those five interviews by stating that Schulz "had not been very forthcoming," had shown "lack of candor," and had continued "his deceptions." (Schulz App. 29-30) Moreover, the exact wording of the admissions in the grand jury transcript was all important; since Schulz at that point was thinking of himself as a Government witness, he did not challenge the nuances in the prosecutor's questions, and answered with a tame "yes" to one leading question after another. Finally, there was another "admission" in the grand jury transcript which, because of Judge Frankel's view of Rule 11(e)(6), was left open for the Government to use in rebuttal. (Tr. 2041-45, Schulz App. 131-35) The practical effect of this ruling was to prevent Schulz from testifying in his own defense, since to explain the "admission" Schulz would have been forced to inform the jury of his offer to plead guilty.

The facts concerning this other "admission" were as follows: In the evening before Schulz' grand jury appearance, in the absence of counsel, the prosecutor pressured Schulz to say that he had lied in previous testimony. Only a few, unfairly selective portions of that testimony were shown to Schulz. The prosecutor persuaded Schulz on the pretext that admitting he had lied would "soften the cross examination" of him as a Government witness. (Tr. 2019, Sch. App. 109) The prosecutor has never denied making this statement. Schulz charged the prosecutor only with overzealousness, and explicitly declined to accuse him of subornation. (Tr. 2024, Schulz App. 114) The prosecutor left no question as to what he conceived to be the correct answer, and Schulz yielded because he remembered the prominent provision in the plea agreement that allowed the prosecutor to nullify it if, in the prosecutor's judgment, Schulz gave a false answer. (Tr. 2024-25, Schulz App. 114-15; see Schulz App. 6)

In a footnote at p. 103, the Government claims that Schulz' admissions were wholly truthful. Yet at pp. 106-07, it asserts the exact opposite, claiming that "Schulz lost all protection of the written agreement by breaching the under-

takings contained in it, to wit, to provide future truthful information...." Judge Frankel, far from sustaining any such contention, explicitly declined to adjudicate whether Schulz actually believed he had lied in his early testimony. (Tr. 2039, Schulz App. 129) The Court suppressed the bare "I lied" admission on general grounds of fundamental fairness, although leaving it open for use on rebuttal if Schulz took the stand. (Tr. 2045, Schulz App. 135)

Moving on to the legal aspects, the Government claims that Rule 11(e)(6) "applies only to the actual allocution statements in open court." (Govt. Brief, p. 105) This position was not supported by Judge Frankel, nor is it supported by a single decided case. It is contradicted by United States v. Herman, 544 F.2d 791 (5th Cir. 1977); United States v. Albano, 414 F. Supp. 67, 69 (S.D.N.Y. 1976); and 2 Weinstein's Evidence, ¶ 410[07], pages 410-41 to 410-42.*

* The Government's brief ignores the mention of grand jury admissions in Judge Weinstein's treatise. See Schulz' initial brief, pp. 43-44. Instead the Government cites, out of context, an earlier passage in the same treatise. There, when he used the phrase "investigatory stage," Judge Weinstein was referring to a hypothetical plea-bargaining discussion between an arrestee and a policeman, taking place neither in a courthouse nor in a prosecutor's office.

At p. 108 the Government suggests some admittedly extreme hypotheticals about the possibilities of deceit by clever defendants.* The Government implies that if Rule 11(e)(6) were applied to Schulz "all sanctions are removed." The Government is abundantly protected by the sanctions provided for in the plea agreement; if, in the sole judgment of the prosecutor, the cooperating witness gives false or incomplete information, the Government can declare the agreement void, and can prosecute him for all crimes, including perjury and obstruction of justice. We emphasize that the Government never made such a judgment about Schulz' information, and never declared the agreement void.

The applicability of Rule 11(e)(6) becomes clear if we focus on the facts in the case at bar. The Government asked for Schulz' testimony. The plea agreement required him to give it. The Government required him to testify before his plea could be presented to a judge, and before there was even a draft of an indictment to give Schulz some idea of what he

* A similar argument was answered by the Herman court: "The Government does not explain why clever defendants would not simply refrain from making incriminating statements altogether...." (544 F.2d at 797)

was offering to plead guilty to. When the Government actually prepared the indictment, it was vastly different from what the prosecutor had led Schulz and his counsel to believe. Thus, in a very real sense, the Government provoked Schulz to "back out" of the agreement. (Tr. 2014, 2033; Schulz App. 104, 123).

Since it is so clear that Schulz' statements were given "in connection with" his offer to plead guilty, the only remaining issue is whether the written plea agreement amounted to a quasi waiver. On that issue, we will not repeat the contentions set forth in Schulz' initial brief at pp. 32-37, 50-52. However, the Government's brief calls for two comments. First, the "former Assistant United States Attorney," mentioned at p. 109, was not the undersigned. He was David Keegan, who represented Schulz from June 11 through June 20, 1976, and at no other time. He did not represent Schulz at the crucial meetings on July 3 and 15, nor did he represent Schulz before the grand jury. (Schulz App. 32-34) The undersigned was appointed by Judge Frankel in September 1976.

Second, the Government's brief, at p. 103, gives an incorrect impression when it says that the form of written agreement here is "uniformly employed in the Southern District." In fact, this form of written agreement was first prepared on

June 21, 1976. (Schulz App. 42) When Schulz brought his motion less than four months later, the United States Attorney's Office quickly added the following paragraph to the form agreement which it currently uses:

"It is further agreed that all statements made by [Cooperating Witness] prior or subsequent to this agreement, including any allocution in connection with the guilty plea provided for herein, shall be admissible in evidence in any and all criminal prosecutions hereinafter brought. Furthermore, [Cooperating Witness] shall assert no claim under Rule 11(e)(6) of the Federal Rules of Criminal Procedure or Rule 410 of the Federal Rules of Evidence that such statements should be suppressed. It is the intent of this agreement to waive any and all rights in this respect."

Today, this is the Government's initial bargaining position. It seems unlikely that every witness will agree to "cooperate" on these terms. It is undisputed that these terms were never presented to George Miller, the attorney who advised Schulz to enter into the agreement and to testify before the grand jury as a Government witness. At Schulz App. 20, Mr. Miller's affidavit states:

"If...Mr. MacDonald had made clear his present position, I might well have advised Mr. Schulz not to enter into the plea agreement. I would have seen the agreement much more as an irrevocable step, and I would have worried more about two unknown factors: (a) Whether Mr. Murray would be indicted, and (b) what incidents would be charged against Mr. Schulz in the conspiracy count and in the other counts."

CONCLUSION

The judgment of conviction against the defendant Schulz should be reversed, and a new trial ordered.

Dated: July 7, 1977

Respectfully submitted,

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7/7/77, U.S. Atty's Office

ACS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Docket No. 77-1140

-against-

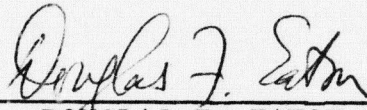
AFFIDAVIT OF SERVICE

EDWIN J. SCHULZ
----- -x

STATE OF NEW YORK) SS.:
COUNTY OF NEW YORK)

DOUGLAS F. EATON, being duly sworn, says:

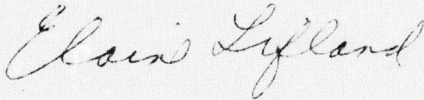
On July 7, 1977 I served the within Reply Brief for Appellant SCHULZ by delivering a copy of it to the United States Attorney's Office for the Southern District of New York, and by mailing a copy of it to each of the attorneys for the other appellants, namely, Hawkins Delafield & Wood, Meyer English & Cianciulli, and Patterson Belknap Webb & Tyler, at the addresses given in their papers.



DOUGLAS F. EATON

Sworn to before me

this 7th day of July, 1977.



ELAINE LIFLAND
Notary Public, State of New York
No. 24-4640450
Qualified in Kings County
Commission Expires March 30, 1979